No. 83-1211

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

In re
TEAMSTERS LOCAL UNION NO. 36,
BUILDING MATERIAL AND DUMP
TRUCK DRIVERS,

Petitioner,

vs.

LEE O. EDWARDS, JR.,

Respondent.

# RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To The United States Court Of Appeals For The Ninth Circuit

## BRIEF FOR RESPONDENT

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT UNITED PARCEL SERVICE V. MITCHELL DID NOT ESTABLISH A STATUTE OF LIMITATIONS FOR BREACH OF DUTY OF FAIR REPRESENTATION CASES BROUGHT BY A UNION MEMBER AGAINST HIS/HER LABOR ORGANIZATION.

(2) WHETHER THE COURT OF APPEALS ERRED BY UTILIZING THE FACTORS SET FORTH IN CHEVRON OIL CO. V. HUSON TO DETERMINE WHETHER OR NOT DELCOSTELLO V. TEAMSTERS WOULD BE GIVEN RETROACTIVE EFFECT IN THIS CASE.

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# RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The United States Court Of Appeals For The Ninth Circuit

Respondent LEE O. EDWARDS, JR., (hereinafter "EDWARDS") herewith responds to the Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit filed by Petitioner BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL UNION

NO. 36 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (hereinafter "LOCAL 36").

Respondent respectfully prays that this Court deny Petitioner's request to review the judgment of the United States Court Of Appeals For The Ninth Circuit in the above-captioned case officially reported as Edwards v. Teamsters Local 36, Building Material & Dump Truck Drivers, 719 F. 2d 1036 (9th Cir. 1983).

I

COUNTERSTATEMENT OF THE FACTS

Respondent EDWARDS first began working for ASPHALT, INC. in 1972 as a truck driver and was continuously employed until December, 1980, when his employment was terminated. Throughout the period of time EDWARDS was so employed he was a member of Petitioner LOCAL 36.

In December, 1980, EDWARDS was

attempting to return to work pursuant to medical authorization after having been disabled in May, 1980 with an injury to his back. Another individual had been hired in the interim as a replacement for EDWARDS. Upon his return to work, EDWARDS was told by the company that they were not going to fire anyone to make room for him and he was discharged from employment.

EDWARDS alleged in his complaint that the true reason for his termination was that he had been a union member unafraid to assert his rights under the collective bargaining agreement particularly as they pertained to safety and seniority. Prior to his termination, EDWARDS was the number two person relative to seniority.

EDWARDS immediately sought assistance from LOCAL 36 to get his job back. He timely filed a grievance alleging improper termination. LOCAL 36, however, failed to

timely refer the matter to the Joint Arbitration Board (hereinafter "Board") for hearing. In a presentation that lasted approximately ten or fifteen seconds, LOCAL 36, by and through a business agent, presented EDWARDS' case to the Board. On February 9, 1981, the grievance was denied by the Board because it had not been referred to the Board by LOCAL 36 within the fifteen day time period established by the collective bargaining agreement. The grievance was stated to be "considered closed".

Thereafter, EDWARDS became aware of an additional basis for a grievance over his discharge and filed another written grievance with LOCAL 36. At the Joint Arbitration Board hearing on this second grievance, the company made a statement on the issue of timeliness; no presentation was made by LOCAL 36 on behalf of EDWARDS. The Board, on March 10, 1981, ruled against EDWARDS again, on the

stated ground that the grievance had not been brought to the attention of the Employer within ten working days of the known occurrence and that the grievance was therefore "waived".

At no time was EDWARDS ever informed of the steps taken by LOCAL 36 to investigate and/or process his grievances.

Under the collective bargaining agreement only LOCAL 36 or ASPHALT, INC. could refer a matter to the Joint Conference Board.

The grievances filed by EDWARDS referenced herein were the first ever filed by him and he had no familiarity with the provisions or processes of the grievance and arbitration procedures.

No decision was ever rendered by the Joint Arbitration Board as to the merits of EDWARDS' grievances.

On December 15, 1981, EDWARDS filed his

complaint in the United States District Court for the Southern District of California.

On March 22, 1982, said Court granted LOCAL 36's motion to dismiss, holding that EDWARDS's claims were barred by California Civil Procedure Code Section 1288.

EDWARDS timely appealed said ruling to the Court of Appeals For The Ninth Circuit. By decision dated November 7, 1983, the Court of Appeals For The Ninth Circuit reversed the District Court's decision and held that EDWARDS's claims were not barred by Section 1288 and would not be barred by the retroactive application of the statute of limitations period contained in 29 U.S.C. Section 160(b) established by this Court in DelCostello v. Teamsters, _____ U.S. _____, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983).

## II

## SUMMARY OF ARGUMENT

Certiorari should be denied. The ruling

of the Ninth Circuit Court of Appeals that United Parcel Service v. Mitchell did not mandate a statute of limitations for unfair representation cases is in full conformity with this Court's opinion in Mitchell.

No express conflict exists among the circuits as to whether Mitchell should be applied to unfair representation cases for all circuits are following the mandate of this Court to examine the nature and effect of the employee's claim when deciding which limitations period is applicable. Even assuming arguendo that such a conflict exists, this Court's decision in DelCostello v. Teamsters removed any special or important reason to review this decision.

The Ninth Circuit's decision on the retroactive application of DelCostello was in full conformity with this Court's decisions on retroactivity, specifically Chevron Oil Co. v. Huson.

No express conflict exists among the circuits regarding the retroactivity of DelCostello; all circuits that have addressed this issue have utilized the Chevron Oil Co. v. Huson factors in analyzing the facts of each individual case, as did the Ninth Circuit in the present case.

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## ARGUMENT

### I

### THE DECISION BELOW OF THE NINTH CIRCUIT WAS IN TOTAL CONFORMITY WITH THE PRE-DELCOSTELLO DECISIONS OF THE SUPREME COURT

Petitioner makes two contentions with respect to their position that the Ninth Circuit's refusal to apply United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) to the union is contrary to decisions by this Court.

First, Petitioner argues that this Court's subsequent decision in DelCostello v. Teamsters, _____ U. S. _____, 103 S. Ct. 2281 (1983) establishes "that as a matter of national labor policy the same statute of limitations should be applied to both claims against an employer and a union."

Second, Petitioner argues that "the Ninth Circuit's belief that a three year statute of limitations period as to the Union

is 'in no sense inherently too long' is also clearly at odds with DelCostello."

Both arguments are predicated on DelCostello, a decision of this Court which was rendered approximately eighteen months after the present case was filed. Both arguments are therefore based on Petitioner's opinion that DelCostello, and the reasoning set forth therein, should be applied retroactively. For the reasons set forth infra, such an application is not warranted.

Furthermore, with the issuance of the DelCostello decision both points have been established. Neither, therefore, presents a compelling, important issue which would warrant this Court granting certiorari.

In Edwards v. Teamsters Local Union No. 36, 719 F. 2d 1036 (1983), the Ninth Circuit Court of Appeals held that "(r)etroactive application of a shorter statute of limitations than that pertaining when the

case was filed is inherently unfair." Supra at 1040.

In Edwards the Ninth Circuit fully addressed the standards for retroactive application set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349 (1971) and declined to apply DelCostello retroactively based on those standards.

In Edwards the Ninth Circuit held that the applicable law at the time that action was filed required that the issue of "timeliness of a Section 301 suit...is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Edwards, supra at 1038, citing UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704-5, 86 S. Ct. 1107, 1113 (1966).

With a duty of fair representation issue, the applicable pre-DelCostello statute of limitations in California was California Civil Procedure Section 338(1). Price v.

Southern Pacific Transportation Co., 586 F. 2d 750 (9th Cir. 1978). In Price it was unequivocally established that a suit against a union for breach of the duty of fair representation is best characterized as an action upon a liability created by statute and the parties therefore had three (3) years within which to bring such an action. Price, supra at 753, see also Edwards at 1039, 1040.

Edwards did not however resolve or even discuss the issue relative to breach of collective bargaining agreement claims against an employer, the issue previously addressed by this Court in Mitchell, and a decision which the Ninth Circuit has held to be non-applicable to breach of duty of fair representation cases. Edwards, supra at 1039; see also, McNaughton v. Dillingham Corp., 707 F. 2d 1042, 1047-48 (9th Cir. 1983).

In Singer v. Flying Tiger Line, Inc.,

652 F. 2d 1349 (9th Cir. 1981), the Ninth Circuit held that prior to Mitchell employees had a four-year statute of limitations period within which to bring their Section 301 breach of collective bargaining agreement action against their employer. This was characterized as an action "based upon an alleged breach of a collective bargaining agreement (which) could best be characterized as a suit upon a written agreement" and the Ninth Circuit applied the four-year statute contained in California Code of Civil Procedure, Section 337. Singer, supra at 1353.

In Singer, the Ninth Circuit held that "the rule of the Mitchell case is not one which might have been anticipated" and declined to apply Mitchell retroactively. Singer, supra at 1353.

The rationale adopted by the Ninth Circuit in the present case and in Singer is

sound, logical and fully consistent with all applicable law and precedent.

The decision below strongly re-affirms this Court's Chevron Oil precedent concerning the inherent unfairness of a retroactive application of a shorter statute of limitations to bar an action and is fully consistent with this Court's pre-DelCostello precedents.

With specific respect to Petitioner's "uniformity" argument, prior to DelCostello this Court had never ruled or commented on the need for a uniform statute of limitations. In fact, as late as the Mitchell ruling, this Court had never even ruled or commented on the need for a uniform statute of limitations for either an action against an employer under Section 301 or against a labor organization for breach of the duty of fair representation, much less a uniform statute of limitations for both.

The Mitchell decision was applicable only to Section 301 suits against an employer; yet, regardless of the scope of this decision, its effect has now been supplanted by DelCostello. The effect of Mitchell no longer presents a compelling, important issue which would warrant this Court granting certiorari.

With respect to Petitioner's argument regarding the three year statute of limitations which the Ninth Circuit held applicable to pre-DelCostello duty of fair representation cases, Petitioner's position is legally and factually incorrect. It is sufficiently illustrative of EDWARDS's position to note that this Court, in UAW v. Hoosier Cardinal Corp., applied a six-year statute of limitations while expressly holding that such a period is consistent with the proposition that "rapid disposition of labor disputes is a goal of federal labor

law". 383 U.S. at 707, 86 S. Ct. at 1114.

Certiorari should not be granted. The decision below was in full conformity with this Court's pre-DelCostello rulings.

II

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS REGARDING THE APPLICATION OF MITCHELL TO DUTY OF FAIR REPRESENTATION CASES IS NOT IN DIRECT CONFLICT WITH THAT OF ANY OTHER CIRCUIT ON THE SAME ISSUE; ASSUMING ARGUENDO IT WAS, THE DELCOSTELLO DECISION HAS REMOVED ANY SPECIAL OR IMPORTANT REASON FOR REVIEW OF THIS DECISION

In essence, Petitioner contends that the decisions of the Court Of Appeals For The Ninth Circuit conflict with the decisions of the Court Of Appeals For The Sixth Circuit concerning the applicability of United Parcel Service v. Mitchell to duty of fair representation cases.

In Mitchell it was expressly stated that this Court was called upon "to determine which state statute of limitations period should be

borrowed and applied to an employees action against his employer under Section 301." 451 U.S. at 58, 101 S. Ct. at 1559.

In the present case below, the Ninth Circuit re-affirmed its prior holding that the Mitchell decision did not resolve the question of how an action against a union should be characterized. In full conformity with precedents of this Court, the Ninth Circuit examined the applicable precedents and found that the appropriate state law statute of limitations for violations of statute was three years.

In its prior decision on this same point, the Court of Appeals agreed with the analysis of Justice Stevens who, in concurring in part and dissenting in part in Mitchell, stated that the claim against the union for unfair representation may not be "characterized as an action to vacate an arbitration award...." 451 U.S. at 73 cited

in McNaughton v. Dillingham, 707 F. 2nd 1042 (9th Cir. 1983).

The Ninth Circuit is not alone in recognizing the limited scope of Mitchell. See, e.g. Sear v. Cadillac Automobile Club of Boston, 654 F. 2d 4 (1st Cir. 1981); Davidson v. Roadway Express, 650 F. 2d 902 (7th Cir. 1981).

This Court's decision in Mitchell was clearly aimed only at litigation by an employee that sought relief from an employer substantially similar to that which would ordinarily be obtained through the grievance and arbitration machinery typically found in industrial self-government. In applying state statutes of limitation for vacation of arbitration awards this Court realistically held that such a construction was appropriate because "if the employee were now to prevail against the employer on this claim, the necessary effect of the resulting court order

would be to undo the arbitration award." Mitchell, supra at 746.

Both the Courts Of Appeal For The Sixth Circuit and the Ninth Circuit in the present case have followed this analysis, albeit with different results due to different facts. Specifically, both circuits have clearly recognized that Mitchell required the courts to look to the effect of the employee's successful resolution of the litigation as its guide to the appropriate state statute of limitations.

It follows, therefore, that in Badon v. General Motors Corporation, 679 F. 2d 93 (6th Cir. 1982), the hybrid 301/unfair representation action was primarily directed towards obtaining an arbitration-type remedy for the employee, namely the pension benefits provided by the national agreement between General Motors and the United Auto Workers. The Sixth Circuit in Badon succinctly stated

that the purpose of an employee's Section 301 lawsuit "is to set aside a final and binding decision reached pursuant to the terms of a collectively bargained agreement." Supra at 97.

Badon further stated that the same statute of limitations should be applied to the actions against an employer and a union because "damages against the union would be limited to attorneys fees, court costs, travel expenses and other costs incidental to plaintiff's attempts to recover. Lost wages, lost benefits, and punitive damages are not recoverable against a union in an unfair representation action pursuant to Section 301. (citation omitted). It would be contrary to sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action." Supra at 98.

In Lawson v. Truck Drivers, Chauffeurs & Helpers, etc., 698 F. 2d 250 (6th Cir. 1983), the Sixth Circuit followed the Badon decision, although specifically acknowledging that as to the Section 301 action against the employer and the unfair representation action against the union, "as Justice Stevens points out in his concurring opinion in Mitchell, the two causes of action conceptually are based on somewhat different theories...." Supra at 253.

In the third Sixth Circuit case cited by Petitioner, D'Andrea v. American Postal Workers Union, etc., 700 F. 2d 335 (6th Cir. 1983) the action was against both an employer and a labor organization and principally sought relief for a wrongful discharge. D'Andrea waited three years after losing the arbitration decision to bring his action. In D'Andrea the Sixth Circuit followed the precedents of Badon and Lawson without any

substantive discussion of the issue.

However, despite these Sixth Circuit decisions, the rationale upon which Badon was based in substantial part has been rendered inaccurate by this Court's decision in Bowen v. United States Postal Service, _____ U.S. _____, 103 S. Ct. 588 (1983). As set forth above, the Baden decision focused on the virtual unavailability of substantive relief against a union to conclude that the same statute of limitations should apply. Justice Powell, writing for this Court in Bowen, stated: "The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the

damages. _____ U.S. at _____, 103 S. Ct. at 595.

The Court held that apportionment of the damages was required by Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903 (1967) and ordered entry of judgment against the union for $30,000.00 of the back pay found due.

The rationale of the Sixth Circuit's 1982 decision in Badon is thus inapplicable and strongly negates the presence of any express conflict between the Sixth Circuit and the Ninth Circuit on the issue in question.

However, if this Court should determine that a conflict does exist, EDWARDS submits that (1) the conflict does not create any special or important reason for review in light of the DelCostello decision which unequivocally stated this Court's ruling as to cases of this nature and (2) that even if a special or important reason for review

existed, it should be a decision of the Sixth Circuit which should be reviewed, for it is that circuit's decision which deviates from the express precedents established by this Court.

Certiorari should be denied.

III

THE NINTH CIRCUIT'S DECISION NOT TO RETROACTIVELY APPLY DELCOSTELLO TO THIS CASE IS IN TOTAL CONFORMITY WITH THE DECISIONS OF THIS COURT

Petitioner argues that the Ninth Circuit's refusal to apply DelCostello in this case "is clearly out of step with this Court's continuing willingness to apply DelCostello in similar situations." Appellant cites as alleged support for this position the DelCostello decision, Teamsters Local 988 v. Edwards, _____ U.S. _____, 103 S. Ct. 3104 (1983) and District 1199 v. Assad, _____ U.S. _____, 104 S. Ct. 54 (1983).

It is clear from DelCostello that the six month period set forth in 29 U.S.C. Section 160(b) is now to be the applicable statute of limitations governing suits against both an employer for breach of a collective bargaining agreement and a labor organization for breach of its duty of fair representation.

Petitioner argues that DelCostello and its companion case United Steelworkers v. Flowers both concerned individuals situated similarly to EDWARDS and therefore this dispute should be resolved in a similar fashion; this point, however, is erroneous on at least three grounds.

First, Petitioner's argument ignores the fact that retroactivity was clearly not argued or decided in DelCostello. Petitioner's argument on this point is, in essence, that since the Court applied the decision to the parties before them, a

decision on the retroactivity question was thereby made. This Court in rendering such a decision was bound by the "case or controversy" requirements of the Constitution. Pursuant to Article III, Section 2, the judicial power encompasses adjudication, and its final and complete determination and effectuation. It is "the power of a court to decide and pronounce a judgment and carry it into effect between two persons and parties who bring a case before it for decision." Muskrat v. United States, 219 U.S. 346, 356, 31 S. Ct. 250 (1911).

It follows, therefore, that the issue of retroactive application of a decision is a separate and distinct legal issue from the factual decision reached by this Court on the case before it previously.

Second, this Court has addressed both the concept and practical application of retroactivity and has established specific

standards for rendering a determination on the issue of retroactive application of a decision. Those standards are set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, (1971) and were closely followed by the Ninth Circuit. The retroactivity issue, therefore, is one which is guided by clear precedent. The absence of any decision on this point in DelCostello mandates that this Court's previously-established precedent be utilized in determining the issue and this is precisely what the Ninth Circuit did below.

Third, the fact that other cases may have been or will be remanded for further consideration in light of DelCostello, see,e.g. Teamsters Local 988 v. Edwards, and District 1199 v. Assad, is not at all determinative of the alleged implications of DelCostello or the intentions of this Court beyond this Court's intent to allow the Courts of Appeals to use applicable law and

their sound judgment to resolve these issues on a case by case basis. The Ninth Circuit did just that in closely analyzing the Chevron Oil factors and applying them to the facts presented.

In reviewing these factors for the present case the Ninth Circuit found that DelCostello did effectively overrule existing law in the Ninth Circuit by replacing a state statute of limitations with a federal one in fair representation cases. Other circuits may not have had clear law on this point prior to DelCostello, but the Ninth Circuit did.

As to the second factor, Chevron Oil requires that the court "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Supra 404 U.S. at 106-7, 92 S. Ct. at 355. The Ninth Circuit considered the

facts of this case and found "that the reasons behind allowing actions against a union for breach of the duty of fair representation would be disserved by barring suit by an employee when precedent existing at the time of filing permitted it." Edwards, supra at 1040.

The third factor established by Chevron Oil was also found to have been met; based on the facts of this case, the Ninth Circuit quoted from the express language of this Court in Chevron Oil, namely: "It would...produce the most 'substantial inequitable results'....to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him." 404 U.S. at 108, 92 S. Ct. at 356.

The Ninth Circuit below concluded that within its jurisdiction EDWARDS was "unable to anticipate the rule in DelCostello". In

other circuits, another outcome might be warranted based on that circuit's pre-DelCostello rulings in similar cases.

Yet, the Ninth Circuit's reasoning and decision below to not apply DelCostello retroactively was clearly in conformity with this Court's decisions. This Court should not grant certiorari to review this decision.

IV

THERE DOES NOT EXIST AN EXPRESS CONFLICT AMONG THE CIRCUITS AS TO WHETHER DELCOSTELLO SHOULD BE APPLIED RETROACTIVELY

Petitioner's representation that an express conflict exists among the circuits with respect to the issue of the retroactive application of DelCostello is inaccurate.

The decision of the Ninth Circuit Court Of Appeals on retroactivity in the present case was based on that Circuit's application of the factors set forth in Chevron Oil to the facts of the case before it.

The decision of the Third Circuit Court Of Appeals on retroactivity in Perez v. Dana Corp., 718 F. 2d 581 (3d Cir. 1983) was also based on that Circuit's application of the factors set forth in Chevron Oil to the facts of the case before it.

The decision of the Fifth Circuit Court Of Appeals on retroactivity in Edwards v. Sea-Land Service, Inc., 678 F. 2d 1276 (5th Cir. 1982) was also based on that Circuit's application of the factors set forth in Chevron Oil to the facts of the case before it.

The differing results is attributable not to any conflict regarding the manner in which the retroactivity of DelCostello is to be decided but is, rather, attributable to distinctions among the Circuits in their pre-DelCostello rulings and factual differences in the cases themselves.

Petitioner also attempts to rely on

other circuit court cases where the Court did not address or rule on the issue of retroactivity or the appropriateness of the Chevron Oil factors. See, e.g., Metz v. Tootsie Roll Industries, Inc., 715 F. 2d 299 (7th Cir. 1983).

Yet, it is clear that with two of these cited cases, Hand v. International Chemical Workers Union, 712 F. 2d 1350 (11th Cir. 1983) and Storck v. Teamsters Local 600, 712 F. 2d 1194 (7th Cir. 1983), the Circuits applied DelCostello retroactively to permit the employee to litigate the case, not to deny him access to the legal system---these results are in full conformity with the Chevron Oil factors for they remedy a result caused by an unduly short limitations period and prevent a substantial injustice. Both of these decisions are in complete conformity with the Ninth Circuit's opinion in the present case which was substantially

predicated on the concept that "retroactive application of a shorter statute of limitations than that pertaining when the case was filed is inherently unfair." Edwards, supra at 1040.

Finally, Petitioner's cited case of Ernst v. Indiana Bell, 717 F. 2d 1037 (7th Cir. 1983) can in no way be considered to create an express conflict on the issue before this Court because Ernst related to an action against an employer, an issue clearly disposed of by this Court in Mitchell.

No express conflict exists among the circuits with regard to the legal precedent governing the issue of the retroactive application of DelCostello to actions brought by an individual against a labor organization for breach of the duty of fair representation. Certiorari should be denied.

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## CONCLUSION

For the reasons set forth herein Respondent LEE O. EDWARDS, JR., respectfully prays that this Court deny the petition for writ of certiorari herein.

Dated: February 17, 1984.

Respectfully submitted,

ADLER and GNIATKOWSKI

By _____

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No. 83-1211

In re
TEAMSTERS LOCAL UNION NO. 36, BUILDING MATERIAL AND DUMP TRUCK DRIVERS
v.
LEE O. EDWARDS, JR.

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AFFIDAVIT OF SERVICE--SERVICE BY MAIL

State of California )
) ss:
County of San Diego )

I, THOMAS E. GNIATKOWSKI, depose and say that I am an attorney in the office of ADLER and GNIATKOWSKI, attorneys of record for LEE O. EDWARDS, JR., the Respondent herein, and a member of this Court, and that on February 17, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Response In Opposition To Petition For A Writ Of Certiorari on each of the parties required to be served herein, as

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follows:

RICHARD D. PROCHAZKA, Esq.
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LYNN R. McDOUGAL, Esq.
McDOUGAL, MELOUCHE, LOVE & ECKIS
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All parties required to be served have been served.

Dated: February 17, 1984.

ADLER and GNIATKOWSKI

By /s/ Thomas E. Gniatkowski
THOMAS E. GNIATKOWSKI
Attorney(s) for Respondent
LEE O. EDWARDS, JR.

On February 17, 1984, before me the undersigned, a Notary Public in and for said State, personally appeared THOMAS E. GNIATKOWSKI, known to me to be the person whose name is subscribed to the within

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instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

/s/ Bonnie R. Reiff-Craig
Notary Public in and for said State

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